No. 85-1280

Supreme Court, U.S.
FILED
JAN 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL B. and his parents MR. AND MRS. B.,

Petitioners,

VS.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented For Review 2

Constitutional Provisions And Statutes Involved 2

Statement Of The Case 2

Reasons For Granting The Writ 2

I.

The Petitioners Should Be Entitled To Counsel Or Payment Of Attorney's Fees As A Matter Of Equal Protection And Due Process Of Law. 4

II.

The Court Of Appeals Erred In Affirming The Trial Court As To The Sufficiency Of The Complaint And The United States District Court And The United States Court Of Appeals For The Seventh Circuit Based Their Opinion On The Fact That The Petitioners Have Not Exhausted Their Administrative Remedy And It Is A Matter Of Fact And Record That the Petitioners Did Exhaust But It Becomes Self-Evident That The Material Submitted Was Not Read. 5

Conclusion 6

Appendix:

A — Unpublished Order ..... App. 1-11

B — Decision and Order ..... App. 12-27

AUTHORITIES CITED

Cases

PAGE

Anderson v. Thompson, 658 F2d 1205 (7th Cir. 1981) 5

Gideon v. Wainwright, 372 U.S. 335 (1963) 4

Johnson v. Zerbst, 304 U.S. 458 (1938) 4

Powell v. Alabama, 287 U.S. 45 (1932) 4

Smith v. Robinson, 104 S.Ct. 34, 57 (1984) 5

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on October 24, 1985.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed on October 24, 1985 and is set forth in the appendix, App. 1-11. The decision of the United States District Court for the Eastern District of Wisconsin, Judge Terence T. Evans, presiding, was entered on July 27, 1984 and is set forth in the appendix, App. 12-27.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Are the parents of a handicap child and/or a handicap child entitled to either the appointment of counsel or attorneys' fees to employ counsel in order to prosecute claims of violation of 20 U.S.C. § 1401, *et seq.* as a matter of equal protection and due process of law?

2. Did the Court of Appeals for the Seventh Circuit and the United States District Court for the Eastern District of Wisconsin err in holding that the Complaint filed by the plaintiffs-appellants-petitioners failed to adequately set forth a cause of action or justifiable controversy under 20 U.S.C. § 1401, *et seq.*?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves 20 U.S.C. § 1401, *et seq.* and the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The petitioners are the parents of a handicap child and an emotionally disturbed and handicap child who filed a Complaint in the United States District Court for the Eastern District of Wisconsin in 1983 alleging various violations by the Wisconsin Department of Public Instruction and various subsidiaries thereof and responsible individuals claiming that the handicap child had been improperly placed and denied a free and appropriate and adequate education and that petitioners' collective constitutional rights to due process of law and equal protection had been violated when they attempted to redress their grievances administratively

and that the defendants had made intentional misrepresentations to the petitioners, been negligent, and intentionally inflicted emotional distress upon the handicap child and that the actions of the defendants had been in bad faith. The petitioners requested injunctive and declaratory relief as well as compensatory and punitive damages. Some of the claims asserted by the petitioners were dismissed upon motion of the defendants and the remaining claims were denied after evidentiary hearing. The Court of Appeals affirmed the decision of the trial court for the reasons set forth in the opinion and rejected the assertion that the petitioners should be entitled to equivalent legal assistance as that provided to the defendants-appellees by reason of financial resources derived from tax base revenues.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS SHOULD BE ENTITLED TO COUNSEL OR PAYMENT OF ATTORNEYS' FEES AS A MATTER OF EQUAL PROTECTION AND DUE PROCESS OF LAW.

The case at bar raises a question heretofore not raised or addressed by the United States Supreme Court, i.e., whether the Fifth Amendment to the United States Constitution compels that parents of handicap children be furnished counsel to pursue claims against responsible agencies under 20 U.S.C. § 1401, *et seq.*

The issue as raised is one of fundamental fairness and constitutional equality. It is respectfully submitted that the Court of Appeals for the Seventh Circuit erroneously distinguished the authority presented by the appellants as "case law governing indigent criminal defendants who face the possibility of incarceration." See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Powell v. Alabama*, 287 U.S. 45 (1932).

Such a facile rationale ignored the language of the Fifth Amendment which by its express terms prohibits deprivation of property or life without due process of law as well as liberty and further ignored the historic circumstances in the case at bar.

The petitioners had been required for 11 years, all through the administrative process, to present their case without counsel while the opponents were furnished the luxury of unlimited resources from tax coffers to pay for the services of the best attorneys available within the system. Plaintiffs were able to muster sufficient financial resources to obtain counsel for purposes of filing the

initial Complaint in the United States District Court for the Eastern District of Wisconsin but again were obliged to present their appeals without counsel. And, again on appeal the defendants had unlimited resources with respect to counsel.

II.

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT AS TO THE SUFFICIENCY OF THE COMPLAINT AND THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BASED THEIR OPINION ON THE FACT THAT THE PETITIONERS HAVE NOT EXHAUSTED THEIR ADMINISTRATIVE REMEDY AND IT IS A MATTER OF FACT AND RECORD THAT THE PETITIONERS DID EXHAUST BUT IT BECOMES SELF-EVIDENT THAT THE MATERIAL SUBMITTED WAS NOT READ.

The Court of Appeals' opinion sets forth the claims asserted by the petitioners in accurate detail but erroneously concludes that the Complaint did not allow a sufficient predicate to entitle the petitioners to trial on any of the issues. It may well be that the Handicap Children's Act, 20 U.S.C. § 1401, *et seq.* is nothing more than empty rhetoric and that under *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981) and *Smith v. Robinson*, 104 S.Ct. 34, 57 (1984) there is no meaningful relief available in reality to persons aggrieved. It is respectfully submitted, however, that those decisions were not intended to totally emasculate the act and this Honorable Court should take this opportunity to give the act meaning and vitality. The United States District Court and the United States Court of Appeals for the Seventh Circuit based their opinion on the fact that the

petitioners have not exhausted their administrative remedy and it is a matter of fact and record that the petitioners did exhaust but it becomes self-evident that the material submitted was not read.

CONCLUSION

For the foregoing reasons certiorari should be granted and the Order of the United States Court of Appeals for the Seventh Circuit dated October 24, 1985 should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNPUBLISHED ORDER NOT TO BE CITED
PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(SUBMITTED AUGUST 6, 1985)*
October 24, 1985
Before
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

No. 84-2432

DANIEL B. and his parents
Mr. and Mrs. B., Plaintiffs-Appellants,

vs.

WISCONSIN DEPARTMENT OF PUBLIC
INSTRUCTION, et al., Defendants-Appellees,

Appeal from the United States District Court
for the Eastern District of Wisconsin
No.83-C-1534.
Terence T. Evans, *Judge*.

ORDER

This appeal concerns a district court determination under the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. § 1401 *et seq.*, that the educational placements offered to appellant Daniel B.[1] were appropriate and that other claims brought by Daniel

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*Both parties have stipulated that oral argument is not being requested in this case.

[1] The full name of the plaintiffs-appellants is omitted at their request to protect their privacy.

and his parents did not state adequate causes of action. For the reasons discussed below, we affirm.

I.

Daniel B. was born in 1969; he is an emotionally disturbed and handicapped child and was so identified by the Glendale-River Hills School District (District 1), the district responsible for his education beginning in school year 1976. Named as defendants in the action instituted by Daniel's parents are the Wisconsin Department of Public Instruction, (DPI), the Wisconsin Superintendent of Public Instruction, District 1's Board of Education and Superintendent, and the Case Manager, Director of Special Education, and teacher responsible for Daniel's education.

Daniel was initially enrolled in a private special education facility, Highland Bluff School in Mequon, Wisconsin, in 1975. His parents claim that he progressed well there, both emotionally and educationally. In 1976, he was enrolled in District 1's public school system because, his parents maintain, the district's Superintendent, defendant John Belton, assured them that District 1 had the facilities and personnel to provide an individual educational program suited to Daniel's needs. In their complaint, Mr. and Mrs. B. allege that from 1976 through 1982 Daniel's education was mishandled by defendants. Specifically, they allege that the defendants failed to properly diagnose Daniel's disability, that they moved him "from one inappropriate facility to another," and that they subjected him to physical and emotional abuse, neglecting his educational needs to the point that Daniel "has regressed to a state of semi-autism, become a recluse, and developed physical deformation of his feet and hands."

Plaintiffs' amended complaint set out six separate causes of action. The counts allege the following violations:

I That a hearing concerning educational plans for Daniel during the 1982-83 school year, held under the authority of Wis. Stats. Ch. 115, was defective in that Daniel's parents were refused legal counsel and were required to furnish legal briefs, in violation of Wis. Stats. § 115.81. In addition, the decision of the hearing officer (that the proposed plans were inappropriate) was reversed on appeal by the Wisconsin Superintendent of Public Instruction, defendant Herbert Grover, in an untimely manner and in a decision that was "erroneous, arbitrary and capricious and contrary to the facts and the law."

II That during the years from 1976 through 1981, District 1's Board of Education, Superintendent and the Case Manager and Principal concerned in Daniel's education denied Daniel a free, appropriate, and adequate remedial education, in violation of 20 U.S.C. § 1401 *et seq.* and Wis. Stats. Ch. 115.

III That the same defendants listed above violated the plaintiffs' constitutional rights to due process of law and equal protection of the law, in violation of 42 U.S.C. § 1983.

IV That the actions of District 1, its Board, and its staff constituted intentional misrepresentation to Daniel's parents and negligent and intentional infliction of emotional distress to Daniel.

V That District 1's Superintendent Belton disclosed confidential material and information about the

identity of Daniel and the nature of his handicap to unauthorized persons, in violation of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232 *et seq.* and Wis. Stats. § 895.50.

VI That from 1976 through 1981, the actions of Superintendent Belton and of Daniel's teacher constituted "egregious and bad faith failure to afford Daniel the procedural safeguards of federal and state law."

Plaintiffs requested injunctive and declaratory relief with respect to Counts I and II, and compensatory and punitive damages with respect to Count III ($8,000,000.00), Count IV ($11,000,000.00), Count V ($1,000,000.00) and Count VI ($5,000,000.00), along with costs and reasonable attorneys' fees.

Defendants filed a motion to dismiss all of the complaint except Count I, and in March 1984 this motion was granted by the district court. *Daniel B. v. Wisconsin Department of Public Instruction*, 581 F. Supp. 585 (E.D. Wis. 1984). Following an evidentiary hearing on Count I, the district court determined that the placement recommendations proposed for Daniel's 1982-83 education were appropriate and entered judgment for the defendants. On appeal, the plaintiffs challenge the dismissal of Counts II through VI and assert that the ruling on Count I was in error and was flawed by further violations of their rights to due process and access to the courts.

II.

We will first address the district court's dismissal of Counts II through VI. Count II, which requested declaratory relief for the school years 1975-76 through 1980-81, was dismissed by the district court because there

had not been complete administrative review of the issues. *Daniel B.*, 581 F. Supp. at 588 (citing to *Riley v. Ambach*, 668 F.2d 635 (2d Cir. 1981) and 20 U.S.C. § 1415(e)(2)). On appeal, plaintiffs assert that their case justifies the relief under one or both of the two examples given in *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), of extraordinary circumstances in which monetary damages may be awarded in an EAHCA action. *Anderson*, however, concerns the award of compensatory damages to parents for monies expended by them in providing appropriate alternative placement for a child who has not been properly assessed by the school district. It does not address declaratory relief for prior violations of the EAHCA, the only relief requested by plaintiffs, and it contains nothing to show how or why the preliminary requirement of administrative exhaustion is to be bypassed. Indeed, one of the reasons given for the propriety of damages in *Anderson* is the length of time the parents must wait in order to fulfill their duty to exhaust all avenues of administrative review. *Id.* at 1213. The requirement of administrative exhaustion has been fully recognized by this court, *Timms v. Metropolitan School District*, 722 F.2d 1310, 1316 (7th Cir. 1983), and plaintiffs present no convincing argument to establish that efforts to obtain administrative review would have been futile in this case.

Count III, alleging deprivation of constitutional rights in violation of 42 U.S.C. § 1983, also relates to this court's decision in *Anderson*. In that case we ruled that the right to relief for violations of the EAHCA is provided exclusively within the Act. 658 F.2d at 1216-17. That position was reiterated in *Doe v. Kroger*, 710 F.2d 1209 (7th Cir. 1983), where we held that the EAHCA exclusively "meets all a parent's needs to assure their children receipt of the benefits of the Act" whether the

challenges are to the provision of services or to the procedures used in making determination under the Act. *Id.* at 1212-13. *See also, Smith v. Robinson*, 104 S. Ct. 3457 (1984). Consequently, the cause of action based on § 1983 was properly dismissed.

Count IV and most of Count V sought monetary damages for causes of action based on Wisconsin state law — intentional misrepresentation, negligent and intentional infliction of emotional distress, and invasion of privacy. The district court declined to exercise pendant jurisdiction over these claims, relying on *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). 585 F.2d at 591-92. In light of the reasons given by the district court for this descision, we cannot say that that was an abuse of the court's discretion. *See Moor v. County of Alameda*, 411 U.S. 693, 712 (1973); *Gibbs*, 383 U.S. at 726; *Smith v. Galesburg Crown Finance Corp.*, 615 F.2d 407, 422 (7th Cir. 1980).

The portion of Count V not raising an issue of state law alleged that District 1 and its officers, specifically Superintendent Belton, violated the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232 *et seq.* The district court properly dismissed this count because that Act does not provide a private damage remedy and the only relief requested in Count V was a total of one million dollars in damages. Plaintiffs do not dispute this ruling with any particularized argument on appeal.

Count VI, alleging "egregious and bad faith failure to afford Daniel the procedural safeguards of federal and state law," was viewed by the district court as a claim for money damages arising out of a violation of the EAHCA. The count was dismissed because, with only a few recognized exceptions, the Act does not provide for

monetary damages in actions brought under § 615(e)(2), 20 U.S.C. § 1415(e)(2). On appeal, plaintiffs contend that their case meets either or both of the exceptions to this rule recognized in *Anderson*. The *Anderson* exceptions involve situations 1) where the placement designed by the state agency posed such "a serious risk of injury to that child's physical health" that the parents were forced to seek and pay for alternative arrangements, and 2) where the defendants acted in bad faith by egregiously failing to comply with the procedures of the EAHCA. 658 F.2d at 1214.

Any claims to which the first *Anderson* exception would relate involve Daniel's placement prior to the 1982-83 school year. Daniel was placed by his parents in St. Mary's Hill Hospital from September 1979 to July 1980. A state action based on the parents' efforts to have the district assume the cost of this hospitalization was dismissed because the parents had failed to exhaust administrative remedies. This same failure of administrative exhaustion prevents prosecution of the issue under the EAHCA, as explained in connection with Count II.

With respect to the second exception recognized in *Anderson* — bad faith on the part of the defendants shown by their allegedly egregious failure to comply with EAHCA procedures — we agree with the district court that the cited examples of actions claimed to demonstrate bad faith do not justify the award of money damages. Plaintiffs place their greatest reliance on a report issued by the Office of Civil Rights (OCR) of the United States Department of Education as "proving" that the defendants acted in bad faith. The report, issued after an investigation made in response to a complaint from Daniel's parents, indicated that the district had failed to adequately and properly evaluate Daniel's needs prior to

June 1981 but that it had been in compliance with evaluation criteria thereafter. The OCR also determined that failure to convene an M-team within a reasonable time after the parents' request in 1979 was a violation of § 504 of the Act, 34 C.F.R. § 104.35. These findings, however, do not establish that the district's actions were taken in bad faith, and the full OCR investigative report indicates a number of charges, including charges that Mr. and Mrs. B. were denied procedural protections of the Act, that were determined by OCR to be without factual support. At the time of the final OCR report, December 1983, the district was reported to be in compliance with all relevant regulatory standards. Plaintiffs argue on appeal that they are entitled to money damages for the violations of § 504 found by the OCR. It is not clear that this was an argument fully presented to the district court but, in any event, the only violations of that provision for which the OCR report could provide supporting evidence occurred prior to 1982, a time when the plaintiffs failed to exhaust administrative remedies. Therefore, the OCR report does not support the award of money damages through either an imnplied right of action under § 504 or under the *Anderson* "bad faith" exception to action brought under § 615(e)(2).[2]

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[2] In addition to the reasons stated above, this Court's discussion of the second "exceptional circumstance" (bad faith on the part of the state) in *Anderson* indicates that an award of money damages may be appropriate only to parents who had had to arrange and pay for alternative placement for a period of time while administrative and judicial relief was being sought. This implication of this discussion is that the monetary damages would be to compensate for the costs of such placement. On Count VI, the plaintiffs were requesting a total of five million dollars in damages.

III.

In a decision issued July 27, 1984, after an evidentiary hearing on Count I of plaintiffs' complaint, the district court entered judgment for the defendants and dismissed this final remaining count. The court held that the five placements offered by the district for Daniel's education for the 1982-83 school year were appropriate under the standards set out in *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982). The district court's opinion thoroughly considered the applicable facts and legal standards, and we affirm and adopt that opinion as the decision of this court's decision regarding the charges encompassed in Count I.

IV.

In their final argument on appeal, plaintiffs assert that the procedures used by the district court in its resolution of Count I deprived them of their constitutional rights to due process of law and access to the courts. Their presentation of the issue covers many events not directly connected to the procedures employed by the district court, such as defendants' decision to hire a private law firm and the behavior of attorneys for the state and local defendants outside the courtroom. However, the relevant portion of their claim appears to focus on the court's failure to require testimony from Dr. Grover, Superintendent of the Wisconsin Department of Public Instruction, and its refusal to provide free legal counsel for the plaintiffs.

Failure to require testimony from Dr. Grover was not error on the court's part. Absent a strong showing of bad faith or improper behavior, a court need not and may not inquire into the mental processes of a governmental agency or its members. *Citizens to Preserve Overton Park*

v. Volpe, 401 U.S. 402, 420 (1971); *United States v. Morgan*, 313 U.S. 409, 422 (1941). In addition, affidavits before the court established that one or more of Superintendent's decisions in Daniel's case had been made by his deputy, Dean Bowles, and that all decisions were based solely on the record. Therefore, neither Bowles nor Dr. Grover would have had independent personal knowledge of the case, and their testimony was not necessary for the court to review the adequacy of the placement options offered to Daniel or the procedures used by the local defendants.

At several places in their brief and in the reply brief, plaintiffs state that they were deprived of their right to have free legal counsel to represent them. This argument is addressed as it applies to the hearing conducted by the district court, although the status of this claim is the same with respect to their appearances at the administrative level. The EAHCA does not require that children covered by its provisions, or parents who initiate action on their children's behalf, be provided with free legal assistance if they are unable or unwilling to obtain counsel on their own. In the earlier portion of the case (involving Count III) the plaintiffs relied on case law governing indigent criminal defendants who face the possibility of incarceration. No new authority for their claimed right to have council is presented in this appeal.

For the reasons stated above, the arguments raised on appeal by the plaintiffs are rejected by this court, and the decisions of the district court that, taken together, decide all issues alleged in the amended complaint are

AFFIRMED.[1]

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[1] The local defendants filed a motion to strike non-record portions of a third appendix volume submitted by plaintiffs. This motion was held in abeyance pending the outcome of a motion to be presented to the district court to supplement the record on appeal with materials objected to by defendants. On March 20, 1985, the district court denied that motion, holding that some of the material was already a part of the record and that some was material that was never before the court in trial of the matter. Plaintiffs have not filed any response to this ruling, although directed to do so within five days of the decision of the district court. Consequently, local defendants' motion to strike non-record portions of the appendix is GRANTED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 83-C-1534

DANIEL B and his parents
MR. AND MRS. B,

Plaintiffs,

v.

WISCONSIN DEPARTMENT OF PUBLIC INSTRUCTION, HERBERT GROVER, THE GLENDALE-RIVER HILLS SCHOOL BOARD OF EDUCATION DISTRICT NO. 1, JOHN BELTON, ROBERT KATTMAN, EDWIN HILL, and JOSEPH AMATO,

Defendants.

DECISION and ORDER

With one exception, all Counts in the Amended Complaint in this case were dismissed in a written Decision filed on March 5, 1984. Count One, the sole survivor, was before me at a hearing that concluded on May 1, 1984. After the hearing, I took the matter under advisement. The parties were invited to submit written arguments which, together with the voluminous file already compiled in this case, have been reviewed. The following constitutes my decision on the remaining Count.

An emotionally disturbed and disabled boy, Daniel B, and his parents (who have abbreviated their names in order to conceal their identity), brought this action to obtain relief from a decision of the Wisconsin Superintendent of Public Instruction. The decision concerns Daniel's placement in a special educational program. Originally, they sought such things as monetary

damages for certain actions taken by the Superintendent and other defendants which, in their view, constituted bad-faith violations of federal and state laws providing for free, appropriate special education for handicapped children. They also claimed constitutional deprivations of due process, intentional misrepresentation, intentional infliction of emotional distress, and invasion of privacy. Only the validity of the decision of the Superintendent of Public Instruction remains. The appeal of Daniel's placement is under the Education For All Handicapped Children Act of 1975, 20 U.S.C. 1401, *et seq.*

One cannot help but admire the dogged determination with which Mr. and Mrs. B have fought for what they truly think is best for Daniel. It is, I believe, a testimonial to the love that they have for their child. If perseverance were the key to victory in this case, they would surely win.

While the persistence of the B's is noteworthy, it has a dark side. Their vigorous efforts have, in my view, clouded their perception of others who have looked at Daniel and concluded that a course or program not of the parents' liking is appropriate. The B's seem to see those who disagree with them as members of some conspiracy bent on ruining their son and causing them unnecessary pain and anguish. I do not see their "opponents" this way, and the fact that the B's do is one unfortunate aspect of this very unfortunate case.

FACTS

Daniel was born on July 4, 1969. At all relevant times, he has lived in the Glendale-River Hills School District. From early on, Daniel has been a child with exceptional educational needs as that term is defined in § 115.76 of the Wisconsin Statutes.

Mr. and Mrs. B first enrolled Daniel in the District schools in 1976. Since then, because of their frequent dissatisfaction with District placements, Daniel has been educated in no fewer than nine different educational settings.

On July 20, 1982, Mr. and Mrs. B formally challenged the District's placement of their son for the 1982-83 school year. The year before, Daniel had attended Jackie Robinson School in the City of Milwaukee. The parents and the District had tentatively agreed that Daniel would return there the following year. During the 1982 summer vacation, however, Mr. and Mrs. B initiated an appeal of the District's placement of Daniel at Jackie Robinson, pursuant to Wis. Stats. § 115.81 (4M). Dr. C. Stuart Robertshaw was appointed as the independent hearing officer, an independent evaluation of Daniel was undertaken, and an extensive hearing was held. Following the hearing, Dr. Robertshaw issued a decision containing the following pertinent findings:

> 6. Daniel was making some education progress during the 1981-82 school year [at Robinson].
>
> . . .
>
> 7. At the time of the May 5, 1982 I.E.P. [Individualized Educational Program] Conference, in which [Mr. and Mrs. B] were in attendance, [Mr. B] agreed that Daniel would remain at the Jackie Robinson School for the next academic year.
>
> . . .
>
> 9. On July 17, 1982, the educational staff had been under the impression that [Mr. and Mrs. B] were in full support of Daniel's continued placement at Jackie Robinson School for the 1982-83 school year. On July 19, 1982, the school district received a letter from [Mr. B] which indicated that: The summer program had failed, and Daniel was "regressing"; the only thing appropriate about the placement at Jackie Robinson School was the teacher; and that Daniel had not been educated

since his placement at Highland Bluff (1975-77). The hearing officer found [sic] that there was little indication, prior to the July 19 letter, that the parents were not in support of the continued placement at Jackie Robinson School. Further, the hearing officer finds that a series of behavior changes in Daniel which occurred while Daniel was enrolled in the summer program with the Milwaukee Public School system, triggered the July 19 letter of dissatisfaction with the Jackie Robinson placement.

10. [Mr. and Mrs. B] have not permitted Daniel to attend Jackie Robinson School during the 1982-83 school year on the basis that they judged such continued placement to be harmful to Daniel. The hearing officer finds that the testimony and exhibits presented at the hearing do not support a conclusion that continued placement at Jackie Robinson School would have been harmful to Daniel.

. . .

13. All appropriate procedures were followed with regard to Daniel's placement at Jackie Robinson School during the 1981-82 academic year.

14. All procedural prerequisites for continuing Daniel's placement for the 1982-83 academic year have been satisifed.

15. The proposed I.E.P. for the 1982-83 academic year incorporated most of the recommendations of the Independent Evaluation Team. Contingent upon:

(a) the fact that the activities are to take place in meaningful context and not in isolation unrelated to life situations, and

(b) that approximately 30% to 50% of Daniel's instruction will occur in non-school environments.

The hearing officer finds that the proposed I.E.P. is appropriate.

Despite finding that Daniel's I.E.P. was appropriate and that he had made progress at Jackie Robinson, Dr. Robertshaw found the placement to be "inappropriate." He did so primarily because he thought Daniel needed to be educated in the community in which he lived — Glendale — and not in the City of Milwaukee, where Jackie Robinson is located. Dr. Robertshaw also found that Daniel did not need a residential placement. Dr. Robertshaw ordered that "Daniel [B] . . . be offered a program consistent with this opinion at the Middle School in Glendale, Wisconsin."

Upon receiving the order, the District offered three different placements to Mr. and Mrs. B: Robinson, Glen Hills (the middle school in Glendale) and Bayside (a school in a nearby community). Mr. B rejected the three proposed placements, and both the District and Mr. and Mrs. B appealed the Robertshaw decision to Dr. Herbert Grover, State Superintendent of Schools. On August 2, 1983, Dr. Grover reversed the Robertshaw decision. He found:

> In the appeal before me, the hearing record amply demonstrates, and the hearing officer found, that all procedural requirements of state and federal law had been met by the district and that the Jackie Robinson School placement would provide Daniel [B] with substantial specialized instruction and related services, and would enable him to receive educational benefits. In short, as the *amicus curiae* suggested, the record and the hearing officer's findings of fact "reflect textbook compliance with federal law".
>
> The school district has also argued that the reasons given by the hearing officer in support of his conclusion that Jackie Robinson is not an appropriate placement for the implementation of the proposed I.E.P. do not support that conclusion. We agree. The

first reason given is that Daniel is 13 years old, has been educated in nine different educational settings in eight years and has been exposed to a variety of instructional strategies and a variety of educational personnel with minimal educational and social development. While true, these facts provide no basis for concluding that Jackie Robinson is an inappropriate placement. Everyone involved with Daniel agreed that Daniel required stability in his educational program, and a continued placement at Jackie Robinson would have been the first time he had remained for more than one school year in the same setting. In addition, Daniel had made significant progress in the short time he had been enrolled at Jackie Robinson, had developed a good and close relationship with his teacher and the aide, and had greatly increased his involvement with his classmates. The testimony also indicated that the progress was likely to continue and could improve greatly if the parents would cooperate with the teacher and support Daniel's program.

The second reason given by the hearing officer is that Daniel's learning characteristics, including his difficulty in transferring what he learns, his learning rate variability, and the necessity to teach skills and provide knowledge in a meaningful context show that Jackie Robinson is inappropriate. The hearing officer made no attempt to explain why the Jackie Robinson placement could not address these concerns. We have been unable to find anything in the record that would support those conclusions. However, these concerns are specifically addressed in Daniel's I.E.P. and the record explicitly establishes that these concerns were addressed by the placement officer when she chose the Jackie Robinson program for Daniel.

The third reason given by Dr. Robertshaw for rejecting the Jackie Robinson placement is that Daniel needs a placement in his neighborhood school. The hearing officer relied on the testimony of

> Independent Evaluation Team members . . . in reaching this conclusion, even though he acknowledged that they were "predisposed to recommending a program in 'close temporal and geographic proximity' to Daniel [B's] residence." There is no indication that the hearing officer paid any attention to the statutory requirements of state and federal law regarding the school district's choice of a location to provide Daniel's program . . . .
>
> None of the reasons given by the hearing officer, either separately or together, support his conclusion that Jackie Robinson school is not an appropriate placement and must be rejected in view of his findings, which are fully supported by the record, that Daniel's I.E.P. can be implemented at Jackie Robinson, and that Daniel would derive substantial benefit from that placement.

Mr. and Mrs. B have appealed Dr. Grover's reversal of the Robertshaw decision pursuant to 20 U.S.C. § 1415(3)(2), which provides that "any party aggrieved by the findings and decision [by a state agency] shall have the right to bring a civil action . . . in a district court of the United States . . . ."

DISCUSSION

The only issue before me is the review of Dr. Grover's reversal of the Hearing Examiner's decision regarding the appropriateness of Daniel's 1982-83 placement at Jackie Robinson School.

The Education For All Handicapped Children Act of 1975 provides federal funding to assist local and state agencies in furnishing handicapped children with a "free appropriate public education." Federal funding is contingent upon a state's compliance with specific procedures designed to effectuate appropriate handicapped education. Wisconsin statutes and regulations on

handicapped education (Wis. Stats. § 115.81 *et seq.*; Wisconsin Administrative Code Ch. PI 11) qualify the state to receive federal funds and require it to abide by the procedures and standards set by the Act.

The parties in this case, not surprisingly, disagree about the scope of review under the Act. The Act provides that:

> In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. 20 U.S.C. § 1415 (e)(2).

In *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court outlined the scope of review under the Act. The Supreme Court held that district courts (state courts also for that matter) are not free

> to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an I.E.P. would be frustrated if a court were permitted simply to set state decisions at nought. The fact that section 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. *Rowley* at 206.

Therefore, while I am required to "make an 'independent decision based on a preponderance of the evidence,' " I must "be careful to avoid imposing [my] view of preferable educational methods" upon the defendants. *Rowley* at 205, 207.

The parties also disagree about the substantive standard required by the Act. The *Rowley* Court also addressed this question, concluding that the Act did not require maximization of the "potential of each handicapped child commensurate with the opportunity provided non-handicapped children." *Rowley* at 200. The Court explained:

> Desirable though that goal might be, it is not the standard that Congress imposed upon states which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. *Id.*

The Court concluded that:

> Insofar as a state is required to provide a handicapped child with a "free appropriate public education," we hold that *it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.* *Rowley* at 203 (emphasis added).

The B's argue that Wisconsin sets a higher standard than that of the Act and that I am therefore required to go beyond the language of *Rowley* in deciding this case. They base their argument on Wis. Stats. § 115.76(3), which defines "child with exceptional educational needs" as any child who has a mental, physical, emotional or learning disability which, "if the full potential of the child is to be attained, requires educational services to the child to supplement or replace regular education." However, this reference to "the full potential of the child" only defines a particular group of children who qualify for special educational services; it does not set a substantive standard for those services. The substantive standard for special education is found in §§ 115.85(1)

(a) (1) and (2), which provide that "[e]ach school district shall ensure that appropriate special education programs are available to children with exceptional educational needs . . . ", and "shall place in an appropriate special education program a child who has been recommended for special education . . . ." The standard is therefore one of "appropriateness," the same standard as that of the Act. The *Rowley* limitations on the nature of this review, therefore, are not altered by state law.

The Court in *Rowley* condensed the focus of review into two questions:

> . . . A court's inquiry in suits brought under section 1415(e)(2) is twofold. *First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?* If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more. *Rowley* at 206-207 (footnotes omitted) (emphasis added).

For the reasons stated below, I find that the defendants have complied with the procedures set forth in the Act, and that Daniel's I.E.P. is reasonably calculated to enable him to receive educational benefits.

Both Dr. Robertshaw and Dr. Grover found that all procedural requirements had been met with regard to Daniel's placement at Jackie Robinson in 1981-82 and his continuing placement there for the 1982-83 school year. The only evidence the B's offer to contradict these findings is a report by the Office of Civil Rights (OCR) issued in response to a complaint by the B's. However, the OCR specifically stated that it was not addressing the appropriateness of the Robinson placement in its report:

> The issue of Daniel's current placement recommendation regarding whether or not it can satisfy the I.E.P. terms is not a part of this complaint and is the subject of Federal Court litigation. Thus, we are not addressing the appropriateness of the district's recommendation placement at Robinson School. Ex. 4 at 10.

The only findings in the OCR report related to this litigation are those dealing with Daniel's I.E.P., and a June 10, 1981 multi-disciplinary team evaluation [M-Team] that led to his original placement at Jackie Robinson. The OCR found both the I.E.P. and the M-Team procedurally correct.

The primary purpose, of course, for insisting on compliance with the procedural aspects of the law is that they insure a measure of participation by parents and guardians in the process. From this participation, a more just and appropriate I.E.P., it is hoped, will flow. If anything can be said about this case, it is this: the B's have certainly been active participants in the process. Unfortunately, the desired result of adherence to the procedural safeguards, i.e., a just resolution, has not, as far as they are concerned, been realized.

There being no evidence in the record to undermine the findings of the hearing examiner and the State Superintendent, they will be upheld. I find that the defendants have met all procedural requirements under the Act.

Drs. Robertshaw and Grover also found that Daniel's I.E.P. was appropriate. None of the educational experts who testified questioned the fundamental adequacy of the I.E.P.; what difference of opinion existed pertained to the place at which that I.E.P. was to be implemented. The B's object not so much to the I.E.P. itself but to the

fact that some of their suggestions were not incorporated into it. This does not render the I.E.P. inappropriate.

The real dispute here is over the location at which the I.E.P. is to be carried out. The District has offered five different placements: Robinson, Glen Hills, Bayside, Wisconsin Hills and Pleasant View. Mr. B has asked the district to pay for his son's education at Brown School in Texas, a residential school for the handicapped. Mrs. B expressed a preference for Concordia Special School in Mequon, a Lutheran affiliated school. As I read *Rowley* as applied to this case, I need not decide which placement is best for Daniel, but only whether any of the offered placements will provide "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley* at 203. For the reasons outlined below, I find that each of the five placements offered by the District are appropriate.

Jackie Robinson — Dr. Robertshaw's findings largely support the conclusion that Jackie Robinson remains an appropriate placement for Daniel under the *Rowley* standard. He found that Daniel was making some educational progress during his year at Jackie Robinson, and that the school was not, as the B's contended, harmful to Daniel. He also found that the I.E.P. implemented at Jackie Robinson would provide substantial specialized instruction and related services. This, coupled with the procedural correctness of the District's actions, satisfies the *Rowley* criteria for appropriateness under the Act. I agree with Dr. Grover's assessment of the hearing examiner's reasons for finding Jackie Robinson inappropppriate: none of the reasons, separately or together, support a conclusion of inappropriateness given

the fact that Daniel was making progress at the school and that the school was equipped to provide him with the substantial specialized instruction he needs. Nothing in the record substantially contradicts the conclusion of the District's specialists that Daniel's I.E.P. can be successfully implemented at Jackie Robinson with some cooperation from the parents. I recognize that the B's strongly dislike the school and that therefore parental cooperation may not be forthcoming. Their dislike, however, does not make Jackie Robinson inappropriate under the *Rowley* standard.

Glen Hills — Dr. Robertshaw ordered that Daniel's I.E.P. be implemented at Glen Hills Middle School, Daniel's local school. The District's Special Education staff offered to do so. There is no evidence in the record that Glen Hills would be an inappropriate placement for Daniel were his I.E.P. to be implemented there. The B's objection to Glen Hills is primarily that the Special Education Program there is not now appropriate. This has been acknowledged by the District. That is not to say that it could not become appropriate. According to the testimony of the District Special Education personnel, if the B's would accept the placement, the District would create a program at Glen Hills consistent with Daniel's I.E.P., as it would be required to do by law. Consequently, if Daniel's I.E.P. were implemented at Glen Hills, it would be an appropriate placement under the *Rowley* standard.

Bayside School — As with Glen Hills, the B's primary objection to the Bayside School is that the program is not now appropriate for Daniel. But again, if the B's were to accept this placement, the District would create an appropriate program consistent with Daniel's I.E.P.

There is no evidence in the record that the Bayside School would not be appropriate if Daniel's I.E.P. were implemented there.

Wisconsin Hills — The B's first objection to the Wisconsin Hills placement is that it is too far from Daniel's home. Wisconsin Hills is in the Elmbrook School District on the west side of the Milwaukee metropolitan area; Daniel's home in Glendale is on the north side of the Milwaukee metropolitan area. While distance is a factor in the placement decision, it is not so important, when the distance is not great, as to override an otherwise appropriate school. Furthermore, Dorothy Lingren, the Placement Officer for the North Shore Exceptional Education Cooperative [NSEEC], which serves the District, testified that the bus ride to Wisconsin Hills would not be "a great factor," particularly because Daniel would be traveling with two other handicapped students from the North Shore.

The B's second objection to the Wisconsin Hills placement is that it is a self-contained, handicapped-only program. Testimony from several special education professionals indicated that, as a general rule, a non-segregated environment is preferable to a segregated one. However, this testimony reflected an inherent bias against handicapped-only programs, and not a specific conclusion that such a program would prevent Daniel from learning[1]. On the contrary, the experts who were familiar with the placements offered by the district spoke highly of Wisconsin Hills. In fact, Ms. Lingren testified that the significant support services and age appropriate peers available at Wisconsin Hills make it currently the best placement for Daniel. She also testified that Wisconsin Hills could fulfill Daniel's need for stability — which all the experts agreed was significant — since he could

[1] See App. 27

remain there until age 21. (In the non-segregated programs he would have only one or two years before moving into the area high school.) The evidence strongly supports the appropriateness of Wisconsin Hills.

Pleasant View — Like Wisconsin Hills, Pleasant View is a handicapped only, non-neighborhood placement. Beyond this, the evidence supports the programs' appropriateness. For the reasons stated above, these factors, individually or together, do not defeat the program's appropriateness.

Having found that the five placements offered by the District are appropriate, I must find that Brown School in Texas and Concordia Special School in Mequon are not permissible placements under the applicable statutes. Wisconsin Statute § 115.85(2) (d) allows a private school placement only "if no equivalent public program is available." Since appropriate public programs are available, the District may not lawfully offer either private program. Concordia would not be a permissible placement for the additional reason that it is religious affiliated and teaches religion as a part of its curriculum, a practice prohibited by Wis. Stats. § 115.85(2) (d).

After the hearing, Mr. and Mrs. B filed additional motions demanding judgment against the defendant Wisconsin Department of Public Instruction and damages in the form of reimbursement for the costs they incurred in sending Daniel to St. Mary's Hill Hospital and Concordia Special School. The B's demand judgment against the Wisconsin Department of Public Instruction on the ground that the Department elected not to file a post-hearing brief but to stand on the arguments made by the District in its post-hearing brief. Election not to file a post-hearing brief does not constitute grounds for

judgment against the Department. The B's claim for damages, furthermore, was dismissed by my Decision of March 5, 1984. For these reasons, both motions are DENIED.

CONCLUSION

For the foregoing reasons, I find that the District's five offered placements are appropriate under the *Rowley* standard. Accordingly, judgment is entered for the defendants and the Amended Complaint is DISMISSED.

SO ORDERED at Milwaukee, Wisconsin, this 27 day of July, 1984.

BY THE COURT:

/s/ Terence T. Evans
United States District Judge

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[1] This excerpt from the April 30, 1984, hearing is illustrative:

> DR. LOUIS BROWN: Well, first of all, from what you described and from what I know of Pleasant View School [like Wisconsin Hills, a segregated school], it's a segregated school. Only handicapped children go there. And, therein, I think it would be unacceptable to put Daniel for the next six years in a handicapped only environment.
>
> THE COURT: Is it your opinion that every child at that school is inappropriately placed?
>
> THE WITNESS: Well, I would, again, I would have to, I would think if there was something there that they could get that they could not get in a regular school, then I would say let's put them there. But I have yet to meet a severely handicapped child that could not benefit with the interactions with normal people.

Tr. at 30-31.